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Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council

I am attaching for your consideration, and for the consideration of the members of the Security Council, a letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia, Judge Claude Jorda (see annex).

In his letter, President Jorda states that it is the view of the judges of the International Tribunal for the Former Yugoslavia that the victims of the crimes over which the International Tribunal has jurisdiction have a right in law to compensation for the injuries that they have suffered.

President Jorda states that the judges have considered the possibility that the Security Council might be requested to amend the Statute of the International Tribunal in order to confer upon it the power to order the payment of compensation to the victims of the crimes that were committed by the persons whom it may convict.

President Jorda states that the judges have, however, come to the conclusion that it is neither advisable nor appropriate that the Tribunal be possessed of such a power, in particular, for the reason that it would result in a significant increase in the workload of the Chambers and would further increase the length and complexity of trials. The judges doubt, moreover, whether it would be possible for the Tribunal to secure adequate resources to fund such awards as it might make. Furthermore, they consider that it would be inequitable that the victims of crimes which were committed by persons who are not prosecuted and convicted by the Tribunal would not benefit from any orders of compensation that the Tribunal might make.

President Jorda states that the judges of the International Tribunal are nevertheless of the view that, in order to bring about reconciliation in the former Yugoslavia and to ensure the restoration of peace, it is necessary that persons who were the victims of crimes that fall within the jurisdiction of the Tribunal receive compensation for their injuries.

President Jorda states that the judges accordingly consider that the question of compensation of the victims of those crimes should be brought to the attention of the Security Council in order that the Council, or some other organ to which it might refer the matter, might consider possible mechanisms for the payment of compensation, such as the creation of an international compensation commission.

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I would be grateful if you would bring the present letter and its attachment to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

Annex

Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General

On behalf of all the judges at the International Tribunal for the Former Yugoslavia, I have the honour of writing to you today about the important issue of compensation for the victims of the conflicts over which the Tribunal has jurisdiction.

For some time already, this question has been the subject of many discussions among the various actors at the Tribunal. However, the judges, prosecutors, defence counsel and legal officers at the Tribunal agree that the need, or even the right, of the victims to obtain compensation is fundamental for restoration of the peace and reconciliation in the Balkans.

In June of this year, the Prosecutor expressed her wish to the members of the Security Council to use the funds seized from the accused to compensate the victims. I myself raised the issue of victims in my address to the Security Council and, at the time, undertook to consult the judges on the matter.

Since then, the judges of the International Criminal Tribunal for Rwanda discussed the issue at their June plenary, in which I participated along with the other judges of the Appeals Chamber. The judges of the International Tribunal for the Former Yugoslavia also addressed the issue at their plenary in July. On that occasion, they asked the Rules Committee to conduct a more thorough review of the question and to report their conclusions at the next plenary.

Along with this request, I thought it appropriate to include the relevant drafts on the issue which were sent to me by the French Government. When presented with the Committee's report, the judges of the International Tribunal for the Former Yugoslavia adopted its conclusions on 13 September 2000.

Further to a detailed analysis, the report first takes note of a general trend towards recognizing a right to compensation in international law. It thus reaches the conclusion that the victims of the crimes over which the Tribunal has jurisdiction are entitled to benefit from a right to compensation.

The report then addresses the introduction of compensation for victims and, more specifically, the question of whether this should be the responsibility of the Tribunal. Although the report states that amending the Tribunal's Statute and Rules in order to incorporate such a procedure is possible, doing so would be difficult for several reasons. Among these reasons are the resultant additional workload and the significant impact on the conduct of the proceedings and the length of the trials. Moreover, the report concludes that, at the current stage, it would not be wise to implement a new system which would counter all the efforts of the last few years to minimize the length of preventive detention, which is a fundamental right of the accused, by shortening trials. Lastly, the report raises the equally important question of how such victim compensation would be funded given the fact that the accused do not have any resources.

Having said this, the report nonetheless also states that action in respect of compensation must be taken and suggests that setting in place a mechanism

modelled on that of an international compensation commission is a much faster, fairer and better way to ensure that the rights of the victims of the conflict in the former Yugoslavia are satisfied.

The report advocates bringing the matter before the Security Council so that it may turn to the competent United Nations organs to study the most appropriate methods for implementing the victims' right to compensation, such as the setting up of a commission.

Accordingly, I would appreciate it if you would transmit the report appended hereto to the President of the Security Council by way of the channels you consider to be the most appropriate.

(*Signed*) Claude **Jorda**
President

Appendix

Victims' compensation and participation

I. Introduction and overview

A. Background of proposals

1. During the twenty-second plenary, the Prosecutor put forward two proposals relating to victims' compensation and participation. These proposals had previously been submitted to the ICTR plenary, which had considered specific Rule changes made by the Prosecutor but did not adopt them. While the ICTR plenary favoured the proposals in principle, it found that amendments to the ICTR Statute were necessary to adopt these proposals and suggested that the matter be taken up by the Security Council working group currently considering revisions to the Tribunals' Statutes. Thus, the Prosecutor sought the views of the ITFY plenary on these matters. After a general discussion of these issues in the plenary, the issue of victims' compensation, together with the related question of victims' participation, was referred to the Rules Committee for further study. It was agreed that the Rules Committee, with assistance from the Registry, would then report back to the Extraordinary Plenary scheduled for September 2000.

B. Overview

2. While issues relating to what might generally be referred to as "victims' rights" have been addressed in many domestic law systems for long periods of time, consideration of these issues under international law is of relatively recent vintage. In 1985, the General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[1] which has served as the cornerstone for establishing legal rights for victims under international law and has led to a number of developments relating to victims, which are discussed below. Victims' rights have received considerable support from a variety of non-governmental actors (NGOs) and certain Governments as well. They argue that international justice should not only address traditional retributive justice, i.e., punishment of the guilty, but should also provide a measure of restorative justice by, inter alia, allowing victims to participate in the proceedings and by providing compensation to victims for their injuries. This support was critical during the negotiation of the Rome Statute of the International Criminal Court (ICC)[2] and in the subsequent drafting of the ICC Provisional Rules of Procedure and Evidence[3] (ICC Provisional Rules) by the Preparatory Commission for the International Criminal Court. The ICC Statute provides for reparations for victims of crimes within its jurisdiction and for participation by victims during the course of the Court's proceedings.

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[1] General Assembly resolution 40/34, annex.

[2] The Rome Statute of the International Criminal Court (A/CONF.183/9) was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[3] Finalized draft text of the Rules of Procedure and Evidence (PCNICC/2000/INF/3/Add.1), dated 12 July 2000. The ICC Provisional Rules have been adopted by the Preparatory Commission but are subject to approval by the ICC Assembly of States Parties.

3. The approach followed in the ICC Statute, which has been further fleshed out by the ICC Provisional Rules, contrasts with the relative silence of the Statutes of the ad hoc Tribunals on compensation and participation issues. Thus, the approach taken herein is to examine the relevant legal principles and assess the current state of the law in this regard. The discussion then turns to how compensation might be addressed by the Tribunal, examining the practical consequences to the Tribunal's work, the changes necessary to its Statute and Rules of Procedure and Evidence to effect such procedures and financial issues (including matters relating to frozen assets). Other approaches to addressing compensation are then considered, including particularly the United Nations Compensation Commission. Finally, tentative conclusions will be proposed.

C. A note on terminology and approach

4. In the literature relating to victims, there are a number of terms that are used to describe the legal categories by which the injuries of victims should be redressed. These include restitution, reparations, compensation, assistance and rehabilitation. Unfortunately, there is some confusion in the use of these terms in the literature. The following discussion will focus on financial compensation to victims and, where necessary, the question of participation of victims for purposes of obtaining such compensation. This approach is purposely taken and deliberately avoids the use of the somewhat broader concept of reparations, which is the term used in the ICC Statute. The focus on financial compensation is intended to narrow the scope of the discussion and to avoid addressing other remedies which conceptually fall within the ambit of reparations, such as rehabilitation, which would require further study and which appear to fall outside of the Prosecutor's proposals and the discussion in the June 2000 plenary. With regard to other remedial concepts, these are addressed, at least in part, by the Tribunal's current Statute or Rules. For example, restitution of victims' property is addressed under rule 105, and some assistance to victims who testify before the Tribunal is provided by the Victims and Witnesses Section. Regarding assistance to victims, it is difficult to envisage steps that could be taken within current resource limitation to expand the assistance provided to victims.

II. Review of relevant legal principles and assessment of current state of international law

A. Review of human rights norms and development of the law

1. International human rights norms

5. There are various general references to victims' right to compensation for violations of their human rights in international and regional human rights instruments, particularly the Convention against Torture.[4] However, the principal

[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, General Assembly resolution 39/46, annex; United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85. Article 14, paragraph 1, provides:

> "Each State Party shall ensure in its legal system *that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation*, including the means for as full rehabilitation as possible. In the event of the death of the

legal developments in this regard have been in General Assembly resolutions, the work of the Commission on Human Rights and the ICC Statute and Provisional Rules. Moreover, it should be noted that there are a number of domestic jurisdictions that provide for victims' compensation and participation. Thus, in order to attempt to assess the current status of international law relating to victims' compensation, the following discussion will concentrate on these developments.

2. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985[1]

6. As noted above, there was little in terms of specific international norms relating to victims of crime until the United Nations General Assembly, by its resolution 40/34 of 29 November 1985, adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration) in 1985.[5] The General Assembly also recommended in the resolution that all appropriate measures be taken at national, regional and international levels to stem victimization and alleviate the plight of victims.

7. The Victims Declaration provides a description of basic protections afforded to victims. It offers a comprehensive approach to mass victimization, as it includes both individual and collective victims.[6] The principles contained in the Victims Declaration are addressed to States generally and establish four categories of claim that victims might make on the State, and on the criminal justice system in particular: access to justice and fair treatment; restitution; compensation; and assistance.[7] The Victims Declaration defines victims of crime as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights" due to violations of criminal laws.

8. In cases where recompense is not available from the individual perpetrators, the Victims Declaration exhorts States to make financial compensation available for victims who have suffered bodily injury or impairment of physical or mental health as a result of serious crimes and, when appropriate, for the victims' family members.[8] Thus, such recompense should be made also in cases where the State has no responsibility under international or national law to pay compensation, as the criminal was acting in a purely individual capacity and not as an agent of the State.[9] In addition, the Victims Declaration states that "the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm".[10]

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victim as a result of an act of torture, his dependants shall be entitled to compensation" (emphasis added).

[5] Irene Melup, "The United Nations Declaration on Principles of Justice for Victims of Crime and Abuse of Power", in Y. Danieli et al. (eds.), *The Universal Declaration of Human Rights: fifty years and beyond* (1999), p. 53.

[6] Idem.

[7] Roger S. Clark and David Tolbert, "Toward an International Criminal Court", in Y. Danieli et al., idem, p. 102.

[8] Victims Declaration, principle 12.

[9] Clark and Tolbert, supra, note 7, p. 103.

[10] Victims Declaration, principle 13.

3. The van Boven Principles

9. In 1989, following the Victims Declaration, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, began to examine issues relating to victims of crime and requested Theo van Boven to undertake a study on the matter. Mr. van Boven submitted draft principles on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms in 1993, which he revised in 1996 and 1997.[11] The Commission on Human Rights subsequently appointed M. Cherif Bassiouni to revise these draft principles and to take into account both comments from State and non-State actors and the work of Louis Joinet, Special Rapporteur of the Sub-Commission.[12] Bassiouni's revision, the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" (Basic Principles),[13] was adopted by the Commission on Human Rights on 20 April 2000.[14]

10. The Basic Principles oblige States to ensure that their domestic law is consistent with international legal obligations[15] as well as to provide victims with reparations for a State's acts or omissions constituting violations of international human rights and humanitarian law norms.[16] However, in the case where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim.[17] If the party responsible for the violation is unable or unwilling to compensate the victim, the State is to endeavour to provide reparation to the victim or his or her family in line with the Victims Declaration.[18] Moreover, States are called upon to establish national funds for reparations to victims and seek other sources of funds wherever necessary to supplement these.[19]

11. The Basic Principles provide that "adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law" and "should be proportional to the gravity of the

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[11] The first version is found in document E/CN.4/Sub.2/1993/8 dated 2 July 1993. The second version is found in document E/CN.4/Sub.2/1996/17 of 24 May 1996, and the third version is found in document E/CN.4/1997/104 of 16 January 1997.

[12] Professor Joinet, Special Rapporteur of the Sub-Commission on the impunity of perpetrators of violations of human rights (civil and political), developed two versions of the guidelines: E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997. While the van Boven Principles exclusively focus on the issue of reparation for victims, the Joinet Guidelines discuss the topic as an important component of a larger set of principles designed to combat impunity. The Joinet Guidelines and the van Boven Principles are in agreement with respect to the essential elements of victim reparation, although they appear to take varying approaches to enunciating the right to reparation and the corresponding duties of the State.

[13] E/CN.4/2000/62, annex.

[14] Economic and Social Council resolution 2000/41; see *Official Records of the Economic and Social Council, 2000, Supplement No. 3* (E/2000/23), chap. II, sect. A. The Basic Principles have now been circulated to all States Members of the United Nations for comment and the United Nations High Commissioner for Human Rights has been requested to hold a consultative meeting with a view to finalizing the principles and guidelines. The final outcome of the consultative meeting will be considered at the fifty-seventh session of the Commission in 2001.

[15] Idem, principle 2.

[16] Idem, principle 16.

[17] Idem, principle 17.

[18] Idem, principle 18.

[19] Idem.

violations and the harm suffered".[20] The term "reparation" is used in the Basic Principles as a general expression to describe all forms of redress,[21] including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[22] With regard to compensation specifically, the Basic Principles state that "compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: (a) physical or mental harm, including pain, suffering and emotional distress; (b) lost opportunities, including education; (c) material damages and loss of earnings, including loss of earning potential; (d) harm to reputation or dignity; and (e) costs required for legal or expert assistance, medicines and medical services, and psychological and social services.[23]

4. International Criminal Court

12. Building upon the developments outlined above and prodded by NGOs, the Statute of the International Criminal Court, in contrast to the Statutes of the ad hoc Tribunals, confers upon victims of crimes within the Court's jurisdiction a possibility to participate in the Court's proceedings and to obtain reparations. The system implemented in the ICC Statute draws its inspiration from the criminal procedure adopted by numerous judicial systems founded on civil law and from the Victims Declaration and the Basic Principles. However, where the other documents were general in scope, the ICC Statute provides for the actual implementation of these principles.

(a) Participation and representation of victims

13. Under the ICC Statute, a victim may participate in the Court's proceedings in several respects. Pursuant to article 19, paragraph 3, a victim may submit observations to the Court "in proceedings with respect to jurisdiction or admissibility". Moreover, article 68, paragraph 3, recognizes a right of access for victims, in their own personal capacity, to the international criminal justice system, and to be represented in the proceedings before it.

14. The procedures necessary to implement these rights were the subject of considerable and sometimes contentious debate during the ICC Preparatory Commission. The ICC Provisional Rules establish procedures for such participation and representation.[24] These rules provide a mechanism designed to give victims a significant possibility to intervene, either themselves or through the intermediary of a legal representative, at all crucial stages of the proceedings. However, the victim's right to participate is limited: he or she may not participate in the investigation undertaken by the Prosecutor, have access to the evidence gathered by the parties or call witnesses to testify at the hearing.[25]

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[20] Idem, principle 15.
[21] Clark and Tolbert, in Y. Danieli et al., supra, note 6, p. 103.
[22] E/CN.4/2000/62, annex, principle 21.
[23] Idem, principle 23.
[24] Rules 89-93 of ICC Provisional Rules, supra, note 3.
[25] Claude Jorda and Jérôme de Hemptinne, "The status and role of the victim", forthcoming article to be published in *The Statute of the International Criminal Court and International Law* (Oxford University Press), p. 26.

(b) Reparations to victims

15. Article 75 of the ICC Statute establishes in general terms the procedure for the Court to follow in awarding reparations to victims. More specifically, it provides victims with the opportunity to request the Court to make an order for reparations against the accused or, alternatively, to order that such reparations be made through a Trust Fund. The Court, which has sole discretion in deciding whether or not the victim is to receive reparation, may award reparations on an individualized or collective basis, taking into account the scope and extent of any damage, loss and injury.[26] The scope of reparation under the ICC Statute is broad and covers all injuries suffered by the victim, but must be proportionate to the gravity of the violations and damage endured.

16. It must be pointed out, however, that article 75 is addressed only "against" individual perpetrators convicted by the Court, even if the Court itself may make requests of cooperation to States on a case-by-case basis in order to ensure the implementation of its decisions on reparations.[27] Therefore, article 75 does not deal with any issues in relation to States' responsibility, either in the sense of sanctioning the State for the benefit of the individual victim, or in respect of issuing orders against the State. It only provides a framework conferring power on the judges to establish principles and to develop the jurisprudence of the Court with a view to doing justice before it.

17. The ICC Provisional Rules establish the procedure for determining reparations. Provisional rule 95.1 states that the Court can act on an application by the victim or, exceptionally, on its own motion. Where the Court acts on its own initiative, notice will be given to the relevant accused as well as to victims and other interested parties.[28] The Court's ability to act on its own motion is designed to enable it to address the absence of the victim, whose geographical or cultural remoteness from the Court, combined with his or her lack of information or funds and other pressures, may prevent him or her from making an application. An award for reparations can take the form of "restitution, compensation, and rehabilitation".[29]

(c) Trust fund

18. Article 79 of the ICC Statute provides that a Trust Fund shall be established "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims".[30] The Trust Fund is a key element of the regime created by the ICC Statute for the benefit of victims. More specifically, rule 98 of the ICC Provisional Rules states that "the Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impractical to make individual awards directly

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[26] Rule 97.1 of ICC Provisional Rules, supra, note 3.

[27] David Donat-Cattin, "Reparations to victims", in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 967.

[28] Rule 95.1 of ICC Provisional Rules, supra, note 3. See also Muttukumaru, "Reparations to victims", in *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999).

[29] Article 75, para. 2, of ICC Statute. Provisional rule 94.1.f also mentions "other forms of remedy".

[30] Article 79 of ICC Statute.

to each victim".[31] In addition, depending on the number of victims, and also on the scope, form and modalities of the reparations, an award for reparations against a convicted person can be made through the Trust Fund.[32] If necessary, and "following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund".[33]

5. Domestic legal systems

19. Although not in any sense dispositive for purposes of the present discussion, it may be useful to note that most legal systems based on civil law allow for the participation of a victim as a *partie civile*; this procedure allows a victim to participate in criminal proceedings as a civil complainant and to claim damage from an accused. Many common-law countries, on the other hand, do not provide for victim participation and compensation in connection with criminal cases, and any compensation claim must consequently be pursued via a civil lawsuit.

B. Is there a right to compensation?

20. Victims of war have traditionally been compensated only through the medium of the State of which they are nationals. This procedural limitation owes its origin to two interrelated theoretical underpinnings: firstly, States are damaged through injuries to their nationals, and secondly, traditional international law governs relations only among States, which alone have the capacity to press claims against one another and receive and dispose of funds so claimed. However, the emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility. Moreover, there is a clear trend in international law to recognize a right of compensation in the victim to recover from the individual who caused his or her injury. This right is recognized in the Victims Declaration, the Basic Principles, other international human rights instruments and, most specifically, in the ICC Statute, which is indicative of the state of the law at present.

21. Thus, in view of these developments, there does appear to be a right to compensation for victims under international law. Although there is an emerging right of compensation, the law is much less developed on the mechanism by which that right can be exercised. The ICC approach is certainly one method, but there are clearly many others, including claims under domestic law and compensation commissions, such as the United Nations Compensation Commission, which awards compensation based on Iraq's legal responsibility.

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[31] Rule 98.2 of ICC Provisional Rules, supra, note 3.
[32] Rule 98.3 of ICC Provisional Rules, supra, note 3.
[33] Rule 98.4 of ICC Provisional Rules, supra, note 2.

22. The question then is not so much is there a right to compensation but how can that right be implemented. In the context of the Tribunal, there are also a number of other rights and policy considerations at stake, including the right of the accused to a fair and expeditious trial. The following discussion thus turns to ways in which the right to compensation might be implemented.

III. Addressing the right to compensation

A. Providing for a right to compensation before the Tribunal

23. One method of ensuring that individuals who have suffered injuries as the result of violations of the crimes within the Tribunal's mandate receive compensation is to allow for such claims to be brought before the Tribunal, ancillary to the criminal trials of the accused. This approach, which would essentially follow the ICC model, raises a number of legal and practical issues, including difficult financial matters. The following discussion thus examines these issues and then turns to other approaches that would not involve making claims in connection with the Tribunal proceedings.

1. Legal and practical issues

(a) Statutory changes

24. As was discussed at the ITFY plenary, the ICTR judges have already stated their view that the Prosecutor's proposals would require an amendment to the ICTR Statute. This view appears to be well founded and to apply to the ITFY Statute as well. The ITFY Statute does not establish a mechanism for victims to claim compensation, but the Security Council was not completely silent on the subject. For example, the Council, in its resolution 827 (1993) of 25 May 1993, stated that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law". Moreover, the Statute has addressed the related matter of restitution of stolen property, as article 24, paragraph 3 (Penalties), of the Statute provides that in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct to their rightful owner.[34] Thus, it would appear that the Security Council was well aware of the compensation issue but chose not to address it; instead it created the Tribunal for the "sole purpose of prosecuting persons for serious violations of international humanitarian law".[35] This has led some commentators to conclude that the Council excluded the possibility of the Tribunal hearing victims' claims for compensation.[36] In this regard, it should be noted that the ITFY judges have taken this view in drafting the Rules to date.

25. The Prosecutor, in her presentation to the ICTR plenary, initially argued that the judges could adopt rules implementing a victim compensation scheme and providing for representation for victims. However, she apparently now accepts that a

[34] Article 24, para. 3, of the Statute is further elaborated in rule 105, which establishes the applicable procedure.

[35] Security Council resolution 827 (1993), para. 2.

[36] Virginia Morris and Michael Scharf, *An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995), pp. 167, 286-287.

statutory amendment is necessary and that the best course of action would be to seek such an amendment.[37] Thus, there appears to be a consensus that the Statute of the International Tribunal for the Former Yugoslavia would require amendment for either victim compensation or participation.

(b) Changes in the proceedings

26. Any provision for compensation or participation of victims would necessitate substantial changes in the procedures of the Tribunal, which currently do not provide for either direct victims' compensation or participation. In assessing the procedural changes needed to provide for victims' claims, it is useful to examine how adoption, mutatis mutandis, of the ICC Statute and Provisional Rules would affect the current proceedings of the Tribunal. The ICC Statute and Rules are the only international source of procedural rules that have been developed regarding victims' compensation and participation, although they have yet to be applied in practice.

27. The first question would be which victims would be allowed to make claims for compensation. While the class of victims could be drawn in several ways, the only practical approach would be to follow the model established by the International Criminal Court, that is, to allow victims who have putatively suffered injuries as a result of crimes of an accused to make a compensation claim. Any other approach, such as allowing all victims of crimes within the Tribunal's jurisdiction in the former Yugoslavia to make claims or limiting the claims to victims who actually testify, would be either unworkable or clearly unfair.

28. The ICC Provisional Rules have broadly defined victims to include "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[38] Moreover, "victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".[39]

29. The drafters of the ICC Statute and Provisional Rules have recognized that for the victims to have an effective right to compensation they will need to participate in the proceedings and have effective representation. The ICC Provisional Rules allow victims to participate in the proceedings and to be represented by qualified legal counsel. In cases where there are a "number of victims", the victims will be represented by a common counsel, who will be chosen by the victims or, if necessary, by the Court. A victim's legal representative has the right, subject to the rulings of the Court, to participate in the trial proceedings and to also represent his or her client during a reparation hearing.

30. A separate reparations proceeding is envisaged to consider and assess the scope and extent of damage, loss and injury of the victim or victims (a collective procedure for the victim groups is also allowed). Thus, under the ICC Provisional Rules, the Court will have to determine the appropriate type and amount of compensation, which is essentially a private law procedure unrelated to international

[37] Draft transcript of 22nd plenary, p. 293.
[38] Rule 85 (a) of ICC Provisional Rules, supra, note 3.
[39] Rule 85 (b) of ICC Provisional Rules, supra, note 3.

humanitarian law. In this connection it should be further noted that the ICC Provisional Rules envisage the possibility of appeal of the Trial Chamber's reparation order.[40]

31. To provide victims with an effective right to compensation would require significant modifications to the Tribunal's current Rules and practices. As the above discussion of the ICC model shows, a right to compensation must be accompanied by some form of effective legal representation for the victims. In order to perform their tasks effectively, these counsel would need to participate in the proceedings in a limited way. In this regard, it should be noted although these participation rights could be more circumscribed than those envisaged for the ICC, representatives would need to participate to the extent that the proceedings impacted on compensation issues. Moreover, many of the Tribunal's current cases involve large numbers of putative victims. Therefore, the types of procedures adopted in the ICC Provisional Rules would be required. Rules would have to be adopted to provide for certification of victims and victim classes, for the appointment and payment of representatives (most victims would probably be indigent) and for determining the quantum of compensation.

32. In addition to these changes to the nature of the proceedings in the Chambers, a number of other parts of the Tribunal would also be affected by the adoption of such procedures. For example, the Registry would probably be responsible, as it is under the ICC Statute and Provisional Rules, for the appointment and payment of legal representatives and for notifying the victims of their right to make a compensation claim. These additional responsibilities would have resource implications. The Prosecutor's work will also arguably change to some extent, as she would need to take into account the interests of the victims in prosecuting cases. Moreover, the Prosecutor's work in the courtroom would clearly be affected by the presence of victims' representatives.

2. Impact on trial length and workload of the Chambers

33. One of the primary issues that the Tribunal has faced over the last several years has been the length of its proceedings. Following the Expert Group's report,[41] the President has submitted to the Security Council proposals to address the length of trial proceedings and related issues.[42] Therefore, any steps that impact on the length of the Tribunal's proceedings must be considered very carefully.

34. While it is not possible to calculate the actual impact on the length of the proceedings, a general forecast of this impact can be outlined. One important consideration to be borne in mind in this regard is that such provisions have not been applied before in an international tribunal or court or in courts that primarily follow the adversarial model. While the ICC Statute and Provisional Rules give some guidance, they have never been applied in practice. Thus, it is fair to anticipate that considerable time would have to be devoted to debating and drafting the applicable rules; in this connection it should be noted that the ICC Statute and Provisional Rules regarding victim compensation and participation were particularly

[40] Rules 150-153 of ICC Provisional Rules, supra, note 3.

[41] See A/54/634.

[42] Report on the Operation of the International Tribunal for the Former Yugoslavia, submitted by Judge Claude Jorda, President, on behalf of the judges of the Tribunal, May 2000 (see A/55/382-S/2000/865, annex I).

controversial. Moreover, judges, prosecutors and defence counsel would need to become acquainted with the new procedures, which may prove difficult in cases where they had no prior experience with such procedures in their domestic systems.

35. The length of trial proceedings would also be affected, as a number of new procedural steps would be introduced in the trials. These, which are outlined above, include determinations on certification of victims and their representatives and additional evidence to be adduced to prove financial and other losses to victims, including the testimony of victims. Furthermore, the Chambers, and perhaps the prosecution, would need to ensure that victims and their representatives are fully informed of their rights; additional court time would also be necessary to hear any interventions that the victims' representatives may have. Finally, additional time and work would be necessary to hear and adjudicate the actual claims for compensation, including determining the appropriate quantum of any award.

36. While the above can only serve as an overview of the impact that a system of victims' compensation claims would have on the work of the Chambers and trial length, it is clear that there would be some increase in the Chambers' workload and in the length of trials. Thus, consideration must be given to the effect on the right of the accused to an expeditious trial.

3. Financial issues

37. If a system of compensation were adopted, a central issue would be the source of funding of such compensation. Obviously a system that purported to award compensation but failed to ensure that victims would actually be compensated would not be acceptable.

38. There are several possible ways of approaching the question of funding of compensation. One is by direct compensation of victims by the accused. While this approach may work in some cases, it is unlikely to be effective in many of the cases before the Tribunal, as most of the accused thus far have been indigent and not in a position to pay compensation. The Prosecutor has addressed this issue in her proposal by suggesting that compensation be taken from the frozen assets of a convicted person. If the Tribunal's Statute were amended or interpreted to allow for such use of frozen assets for this purpose, the order of forfeiture would need to be addressed to the individual States where the assets were located. In order to ensure the enforcement of such an order, the Tribunal would largely be dependent on domestic laws of these States, which are likely to differ from each other. Possible claims by third parties would have to be dealt with according to these laws and the appropriate procedures in this regard. Moreover, this approach would continue to place certain victims in a more advantageous position than others: if the convicted person had assets, frozen or otherwise, there could be a recovery, but if not, then the claim would be of little value.

39. Regarding the use of frozen or forfeited assets, an alternative approach adopted by some domestic jurisdictions is for the proceeds of forfeited assets to be distributed among various State institutions, which are indirectly involved in compensation of victims.[43] The International Tribunal could apply such a system by

[43] For example, the provisions of the California Uniform Substance Act, where proceeds from the sale of forfeited assets are used firstly to cover expenditures connected with that sale, then distributed to law enforcement agencies, the district attorney's office, a general fund in the

analogy, placing forfeited assets in a fund that could be drawn upon to pay compensation claims to victims on a pro rata basis. This would partially address potential unfairness vis-à-vis victims of indigent accused. The administration and distribution of such funds for the compensation of victims would need to be regulated by appropriate procedures. This approach is also broadly supported by the ICC Statute and Provisional Rules, which allow for the forfeiture of assets as a form of penalty, subject to the claims of third parties.[44] The proceeds of these forfeited assets may then be transferred to a Trust Fund "for the benefit of victims" and their families.[45]

40. Other ways of funding compensation claims may be theoretically possible, such as funding from the United Nations budget or from voluntary contributions from States. However, such funding would no doubt result in concomitant reductions to the Tribunal's other activities and, in any event, would be unlikely to provide more than token funding for compensation.

4. Issues of equity and fairness to all victims

41. Whatever method of funding of compensation is undertaken, it must be acknowledged that it will be unfair in certain respects, in that many victims of the crimes in the former Yugoslavia will not be eligible for such awards. Many will be victims of crimes of individuals who are either not indicted by the Tribunal or who have been indicted but who are not apprehended. Moreover, unless procedures can be developed to address the potential claims of victims injured by those already convicted by the Tribunal, these victims would also not receive compensation. For these reasons, consideration should be given to a more comprehensive method of awarding compensation.

B. Other approaches, not relying on the Tribunal mechanism

42. In addition to providing compensation to victims via adjudication by the Tribunal, there are a number of other models that have developed in recent years. The most prominent organization involved in compensating victims is the above-mentioned United Nations Compensation Commission, which was established by the Security Council. The Commission hears claims from States and international organizations for claims for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations as a result of [Iraq's] unlawful invasion and occupation of Kuwait".[46] Claims brought by individuals or corporations are filed by States through "consolidated claims", although it should be noted that States are not under an obligation to file such claims.

43. The approach of the United Nations Compensation Commission has a number of advantages over claims brought ancillary to court proceedings. It has the possibility of addressing many more claims more efficiently than a court, and it can,

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treasury and eligible non-profit organizations, according to a certain percentage. See H. D. Miller and M. B. Starr, *Current Law of California Real Estate*, 2nd ed., 2000 Supplement, chap. 23.

[44] ICC Statute, article 77, para. 2 (b).

[45] Idem, article 79, para. 1.

[46] Security Council resolution 687 (1991), para. 16.

theoretically at least, review all substantial claims made by victims of the subject violations of law. However, it must be recognized that the Compensation Commission, which is financed by the sale of Iraqi oil, has a unique source of funding that could not be duplicated in the case of the former Yugoslavia.

44. Other States that have endured conflict have provided for compensation to victims via truth and reconciliation commissions. For example, in the case of both El Salvador[47] and South Africa, the respective commissions were given authority to award compensation to victims. While a full discussion of the mechanisms employed by the commissions is not possible here, it should be noted that the amount of funding for the commissions was relatively small and that awards given to victims were more symbolic than compensatory. In any event, although there has been considerable discussion regarding a truth and reconciliation commission for the former Yugoslavia, it is unclear whether it will come into being, much less whether it will award compensation to victims.

45. A final possibility is for domestic jurisdictions to award compensation to victims. Rule 106 already addresses this possibility, providing a mechanism whereby the Tribunal's judgement may be transmitted to State authorities for use in an action under national law. This approach appears unlikely to produce substantial results in the near future.

IV. Conclusions and recommendations

46. As the above discussion demonstrates, victims of crimes within the Tribunal's jurisdiction have a legal right to seek compensation for their injuries. The question then is in which forum should that right be provided.

47. While it would be possible for the Tribunal's Statute and Rules to be amended to provide for a procedure akin to that envisaged in the International Criminal Court, there are a number of factors that make this approach very difficult to implement. These procedures would increase the workload of the Chambers and further exacerbate the length of the Tribunal's proceedings, thus undermining its efforts to provide accused with fair and expeditious trials. Moreover, the Tribunal has now been in existence for a number of years, and the introduction of such procedures is likely to prove difficult to implement and run counter to its principal objective of prosecuting those responsible for the crimes in the former Yugoslavia. In view of the strenuous efforts that the Tribunal is making to address the length of its trials, it would not be wise to debate and adopt procedures which undermine those efforts. Moreover, there are serious questions as to how a compensation scheme could be adequately funded, particularly as many of the accused have few resources.

48. It is agreed, however, that some action is necessary to give effect to the right of victims of crimes in the former Yugoslavia to compensation. It is submitted that a far better approach would be for an international claims commission to be established. While the funding of such a commission would have to be determined by the appropriate international actors, in principle a commission provides a much

[47] See generally "From madness to hope; the twelve-year war in El Salvador: report of the Commission on the Truth for El Salvador", *Official Records of the Security Council, Forty-eighth Year, Supplement for April, May and June 1993*, document S/25500, annex.

fairer and expeditious method of providing a measure of restorative justice to the victims of the wars in the former Yugoslavia.[48]

In view of the foregoing, it is suggested:

- That the President of the Security Council recommend to the Council and to the Secretary-General that methods of compensating victims of crimes in the former Yugoslavia, notably a claims commission, be considered by the appropriate organs of the United Nations.

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[48] There are at least two possible approaches that could be followed in determining the class of victims eligible for compensation by such a commission. One method is to allow claims from only those victims who can show injuries as a result of the commission of a crime falling within the Tribunal's jurisdiction which has been adjudged as such by a final judgement of the Tribunal or a competent national court. An alternative approach is to allow claims by all victims of crimes arising out of the conflicts in the former Yugoslavia, regardless of whether such crimes have been adjudged as such by the Tribunal or other court.